

Control Number: 41622



Item Number: 16

Addendum StartPage: 0

2013 SEP -6 PM 2:44
REGULATING CLERK

**RULEMAKING TO PROPOSE NEW
SUBSTANTIVE RULE 25.245, RELATING
TO RECOVERY OF EXPENSES FOR
RATEMAKING PROCEEDINGS** §
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**PUBLIC UTILITY COMMISSION
OF TEXAS**

TEXAS INDUSTRIAL ENERGY CONSUMERS' INITIAL COMMENTS

I. INTRODUCTION

Texas Industrial Energy Consumers (TIEC) appreciates this opportunity to offer comments on the Commission’s rulemaking to propose new Substantive Rule 25.245 relating to the recovery of expenses for ratemaking proceedings. TIEC has participated in rate case proceedings at the Commission for nearly thirty-five years. Its members pay utility and municipality rate case expenses in addition to their own legal and consulting fees. Accordingly, TIEC appreciates the Commission’s desire to examine standards for the recovery of utilities’ and cities’ rate case expenses.

TIEC would note that a utility’s recovery of rate case expenses is not a matter of right under Texas law. PURA § 36.061 provides that the Commission “may allow” a utility’s “reasonable costs of participating in a proceeding under this title not to exceed the amount approved by the regulatory authority.” PURA, therefore, gives the Commission broad discretion to determine the reasonableness of rate case expenses and whether they should be recovered.¹ The Commission has the authority to make fact-specific determinations regarding, for example, whether rate case expenses are inflated by litigation of well-settled issues, frivolous positions, flawed analysis, and over-lawyering. To the extent the Commission’s findings in a contested case may be construed as a departure from past precedent, the Commission can support its findings with an explanation of its reasoning.² The Commission does not need a new rule to deny a utility’s rate case expenses for fact-specific concerns related to rate case expenses. For example, in Docket No. 40295, the Commission held that a utility’s expenses devoted to overturning

¹ *City of Port Neches v. Railroad Commission of Texas*, 212 S.W.3d 565, 579 (Tex.App—Austin 2006, no pet.) (holding that any fee incurred in presenting a “cost of service” argument is not automatically recoverable as a rate case expense); *City of El Paso v. Public Util. Comm’n*, 916 S.W.2d 515, 522 (Tex.App. —Austin 1995) (holding that the Commission has broad discretion to determine recovery of expenses in a ratemaking proceeding).

² *Oncor Elec. Delivery Co. LLC v. Pub. Util. Comm’n of Texas*, 2013 WL 3013899 (Tex.App. —Austin 2014).

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precedent regarding the recovery of financially-based incentive compensation should not be borne by customers.³

TIEC shares the Commission's concerns that utility rate case expenses are often high in absolute terms and in relation to the rate increase ultimately received by the utility.⁴ Notwithstanding, TIEC believes it may prove challenging for the Commission to articulate clear standards for rate case expense recovery when the issue of reasonableness is almost always a fact-specific inquiry. Given this, the most effective way to deal with potentially inflated rate case expenses is to provide proper incentives for each litigant to control its own costs. One way to accomplish this would be to create a rule that gives utilities and cities more "skin in the game." For example, the Commission may wish to consider whether, as a matter of course, shareholders should bear a percentage of rate case expenses. This could incentivize utilities to self-police their litigation and regulatory costs, as well as decrease frivolous discovery disputes. Litigants who pay their own legal fees have the incentive to conduct a cost-benefit analysis before making any filing or engaging in a lengthy discovery dispute. The Commission should consider ways to incentivize this internal cost-benefit calculus.

In summary, TIEC is not convinced that a rule change is necessary because the Commission already has broad authority to examine rate case expenses under PURA § 36.061. If the Commission does adopt a new rule, it should consider ways to incentivize utilities and cities to act like litigants who pay their own costs. TIEC would also caution against any proposed rule that may have the unintended consequence of increasing overall costs to consumers by limiting due process rights and scrutiny of rate cases. TIEC would, for example, oppose additional limits on discovery for the reasons stated in response to Question 3.

II. RESPONSE TO STAFF QUESTIONS

1. What revisions to the rate filing package form could be made that would result in reduced costs for ratemaking proceedings?

TIEC does not recommend changes to the rate filing package form at this time but reserves its right to respond to the comments of others.

³ *Application Entergy Texas, Inc. for Rate Case Expenses Pertaining to PUC Docket No. 39896, Docket No. 40295, Order at 2 (May 21, 2013).*

⁴ *Id.* at 5.

2. What revisions to the process of reviewing rate case expenses could facilitate the review of costs incurred in ratemaking proceedings?

Utilities and municipalities bear the burden of demonstrating the reasonableness of their rate case expense requests, and the Commission has broad discretion to determine recovery of expenses in a ratemaking proceedings.⁵ The reasonableness of rate case expenses is generally a fact-specific inquiry, and TIEC does not advocate any particular change to the process for reviewing rate case expenses. That said, utilities and municipalities are not uniform in the manner in which they prove up their rate case expenses. Rate case expense proceedings should generally include:

- Sworn expert testimony proving up the reasonableness of the requested rate case expenses;
- Itemized time entries for consultant, regulatory, legal, and other fees; and
- A clear accounting and description of the rate case expense (*e.g.*, internal, third-party, subject matter).

3. Please respond to the following questions regarding the cost of discovery in ratemaking proceedings.

- a. Is reducing the cost of participating in a ratemaking proceeding possible by limiting the use of discovery in ratemaking proceedings? If you believe so, please provide examples of reasonable limitations on the use of discovery.**

No. The Commission should not revise its rules to limit discovery in ratemaking proceedings. Discovery limits would have the unintended consequence of limiting scrutiny and driving up overall costs for consumers. Discovery is necessary because rate proceedings often involve rate increases in the tens to hundreds of millions of dollars and complex issues (*e.g.*, depreciation, return on equity, taxes, cost allocation and rate design, prudence issues, and other policy matters). TIEC has seen rate cases supported with the testimony of more than thirty witnesses, thousands of pages of testimony, and voluminous workpapers. The complexity and discovery needs of rate proceedings are similar to Level 3 cases under Rule 190.4 of the Texas Rules of Civil Procedure, which allows modification of the default Level 2 Discovery Control Plans limitations on interrogatories and deposition hours. Notwithstanding, while significant discovery is necessary, the 185-day timeline for processing rate cases naturally limits the amount

⁵ *City of Port Neches*, 212 S.W.3d at 579.

that is conducted. Moreover, given the statutory deadline in most cases, limits to discovery inherently bias the process in favor of the utility, which has a much greater amount of time to prepare its case before it is filed. Discovery limitations would only inhibit parties' – and ultimately, the Commission's – ability to scrutinize the reasonableness of rate requests with the result being higher overall rates that may not be just and reasonable.

In addition, discovery limitations are unnecessary because Commission rules provide a remedy against unreasonable discovery. P.U.C. Proc. R. 22.142 allows a presiding officer to limit discovery to protect a party against unreasonable or unwarranted discovery requests. The rule permits a person from whom discovery is sought to seek a protective order.⁶ TIEC is not aware of any recent case in which the discovery sought merited such a protective order because the reality is that the parties typically work collaboratively to accommodate utility requests to narrow the focus and scope of discovery. P.U.C. Proc. R. 22.161 also allows the imposition of sanctions for abuse of the discovery process. Discovery is a necessary part of the due process consideration of a utility's rate request, and it typically leads to substantial reductions in overall rates. In the long run, discovery protects consumers against over-reaching rate requests and higher costs and it assists the Commission's ability to protect the public interest.

- b. If limitations on the use of discovery are to be implemented, should separate limitations be set for different ratemaking proceedings, such as base rate cases, energy efficiency cost recovery factor cases, transmission cost recovery factor cases, etc.? How should these be structured?**

TIEC does not address this question because additional discovery limitations should not be imposed.

- 4. Please answer the following questions regarding the possibility of the Public Utility Commission of Texas (commission) retaining the services of a consultant or auditor to review a utility's request for recovery of the cost of participating in a ratemaking proceeding.**
 - a. What would be the benefits of retaining a consultant or auditor?**
 - b. How should the process be structured?**
 - c. Could the implementation of an audit process result in the unintended consequence of increased ratemaking costs? If so, how?**

⁶ P.U.C. Proc. R. 22.142(a)(2).

d. What would be appropriate methods of funding the retaining of a consultant or auditor?

In order to protect the public interest, the Commission should have expertise available to it to examine the reasonableness of rate case expenses, as it does for a variety of issues routinely raised in rate proceedings. If the Commission decides it needs additional expertise in general for a particular matter, it should follow the normal process for obtaining such expertise.

5. Please respond to the following questions regarding the possibility of establishing a maximum reasonable hourly rate for legal and consulting services.

- a. What would be the benefits of establishing a maximum reasonable hourly rate for legal and consulting services?**
- b. How should such a process be structured?**
- c. If the commission adopts maximum reasonable hourly rates, should the commission also adopt specific procedures for reviewing or limiting the number of hours billed for legal and consulting services provided at or below the maximum reasonable hourly rates?**

Not addressed. TIEC reserves the right to respond to the comments of others on these questions.

6. Please respond to the following questions regarding cases in which a utility seeks to recover the cost of reimbursement of a municipality's ratemaking case expenses. Additionally, please explain the rationale for your answers.

- a. What is the appropriate allocation of those costs among the utility's customer classes?**
- b. Is it appropriate to collect those costs from all the utility's customers, or only a subset of customers?**

The Commission should consider whether municipality rate case expenses should be borne by customers within the intervening cities. Customers outside intervening municipalities have no ability to influence positions taken by the municipalities. This is an additional way that the Commission could further align the costs and benefits of each litigants' rate case participation.

7. If you have participated in a rate case in the past 10 years, please provide the following information from each of your previous two rate cases.

- a. How many requests for information did you propound and respond to?**

- b. What was the cost of propounding or responding to those requests?**
- c. What were the highest, lowest, and average hourly billing rates for attorneys you retained?**
- d. What were the highest, lowest, and average hourly billing rates for consultants you retained?**

Not addressed. TIEC reserves the right to respond to the comments of others on these questions.

8. Describe revisions to commission rules or other process aside from the above that could result in reduced costs for ratemaking proceedings.

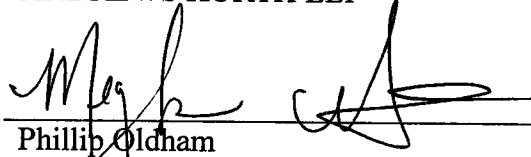
As stated above, TIEC suggests that the Commission examine whether utility shareholders should bear a percentage of rate case expenses. This type of cost-sharing arrangement may provide incentives for utilities to scrutinize whether they are efficiently processing rate cases. Similar to the Commission's rationale for disallowing financially-based incentive compensation on the basis that it accrues primarily to the benefit of shareholders, a percentage of rate case expense also accrues solely to the benefit of utility shareholders. PURA gives the Commission broad discretion to determine the reasonableness of rate case expenses, and the Commission can determine that it is not reasonable for ratepayers to pay for the portion of rate case expenses that solely benefits the utility.

III. CONCLUSION

TIEC appreciates Staff's efforts to examine the current process for the recovery of rate case expenses. TIEC encourages Staff to examine methods that do not jeopardize due process rights of the parties or have the unintended consequence of increasing overall rates. TIEC also encourages Staff to consider a mechanism that could incentivize better self-regulation by cities and utilities.

Respectfully submitted,

ANDREWS KURTH LLP

Handwritten signatures of Phillip Oldham and Meghan Griffiths in black ink, positioned above a horizontal line.

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